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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

AUG - 3 1993

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In Re Applications of

) MM Docket No. 93-156

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## SUMMARY

As a matter of law, Issue 1(a) must be resolved against Glendale because Glendale cannot meet the Commission's established requirements for a television short-spacing waiver.

Commission policy requires that an applicant for a short-spacing waiver make a threshold showing that no fully-spaced location is available. Here, Glendale has made no such showing and admittedly does not know whether fully-spaced sites are available. The fact is that such sites are available. Hence, there is no prejudice or disadvantage to Glendale in requiring that it meet the short-spacing requirements.

Moreover, unlike the FM short-spacing rule cited in the cases on which Glendale relies, the TV short-spacing rule does not permit incumbent short-spaced TV stations to relocate to another short-spaced site. Since a TV incumbent relocating its site would have to specify a fully-spaced site, a challenger like Glendale should have to meet the same standard.

Contrary to Glendale's contention, incumbent WHSG(TV) obtained its present site in full compliance with the spacing requirements and was not granted a waiver. Thus, Glendale has no equitable claim to a waiver and should be held to the same processing standard that WHSG(TV) met.

In any event, Glendale proposes to increase the existing short-spacing, without making any showing that fully-spaced or less short-spaced sites are available. Glendale's claim for "equitable" treatment with the incumbent does not justify an increase in short-spacing, for even grandfathered stations are barred from increasing an existing short-spacing. Nor does the "de minimis" exception apply, since the total short-spacing proposed by Glendale (18.4 kilometers) far exceeds the 1.6 kilometers allowed under that exception.

Finally, Glendale's proposal would severely restrict the ability of a Montgomery Channel 63 applicant to locate a fully-spaced site, a result disfavored by Commission policy.

In short, the undisputed facts demonstrate that Glendale does not warrant a short-spacing waiver under applicable Commission law and policy. Thus, Issue 1(a) should be resolved adversely to Glendale by summary decision.

Before the  
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reference point for Channel 63 allocated to Montgomery, Alabama, Glendale contends that waiver is warranted under the facts and circumstances of this case.

2. According to Glendale, the site from which incumbent Trinity operates WHSG(TV) is itself short-spaced by 18.14 kilometers to the Montgomery reference point. This resulted, says Glendale, when the Commission "by implication waived" the co-channel separation requirement for Trinity's predecessor. Motion, p. 3. Noting that its proposal would increase the existing Channel 63 short-spacing by only 0.26 kilometers (which it excuses as de minimis), Glendale argues that it is entitled under Commission policy to the same waiver that Trinity enjoys. In support, Glendale cites two rulings of the Audio Services Division ("ASD") allowing FM renewal challengers to propose short-spacing because the incumbents were short-spaced.<sup>1/</sup> To deny Glendale a similar waiver here, argues Glendale, would create an "impermissible bias" against a renewal challenger. Motion, p. 5. Moreover, says Glendale, its proposal would still leave a prospective Montgomery applicant an allowable fully-spaced site area of 517 square kilometers. Id., p. 6.

3. As shown below, Glendale is not entitled to a short-spacing waiver. The facts of this case are fundamentally and

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<sup>1/</sup> EZ Communications, Inc., 8 FCC Rcd, 2448, 2451 (ASD 1993) ("EZ"); Royce International Broadcasting, 2 FCC Rcd 1368 (ASD 1987) ("Royce").

decisionally different from those in the Audio Services Division rulings on which Glendale relies. There is also a significant legal difference between the FM and the TV short-spacing rules. Hence, the rationale of the cited FM rulings does not apply here. And even if those rulings did apply, they do not permit a challenger to increase an already substantial existing short-spacing, as Glendale seeks to do by invoking the "de minimis exception" principle.<sup>2/</sup>

4. Thus, contrary to Glendale's contention, the undisputed facts warrant summary decision against Glendale on this issue. Under applicable law, the facts of this case provide no basis

objectionable interference to neighboring stations. To maintain the integrity of the Table, it was necessary to establish minimum mileage separations and to allow only limited deviations from those separations. Those spacing requirements presumptively serve the public interest, and applicants seeking waivers to operate from short-spaced sites are required to demonstrate that the public interest will be better served by a waiver in the circumstances presented than by following the terms of the rule."

In applying this policy, the Commission begins with the following: "Before we can consider the public interest arguments that may support a waiver request, the threshold question is whether no fully spaced sites are available." Id. (emphasis added).

6. Making no effort to meet this threshold question, Glendale bases its waiver request and motion entirely on rulings of the Audio Services Division in EZ and Royce, in which FM renewal challengers were allowed to specify short-spaced sites because the incumbent licensees themselves operated from short-spaced sites. Royce gave no particular reason for this, except to say that the challenger would "not increase the existing short-spacing or create any legally cognizable interference above and beyond that presently caused by [the incumbent licensee]." 2 FCC Rcd 1368. In EZ, the ASD made the same point and explained that a challenger has the "right to have its application processed under the same standards as the incumbent's." The ASD noted that the FM short-spacing rules (§73.213) allowed existing short-spaced licensees to relocate to another short-spaced site as long as the current overlap were



not increased. Under these circumstances, said the ASD, to deny the challenger processing under the same rule would create an "impermissible bias in favor of the incumbent." 8 FCC Rcd at 2451.

1. **The Rationale Does Not Apply Where the Challenger Can Propose a Fully-Spaced Site**

7. That rationale is not apposite here because of a crucial threshold difference between Royce/EZ and this case. In both of those cases, restrictions imposed by existing allocations made it impossible as an engineering matter for a challenger to specify a fully-spaced site.<sup>3/</sup> Thus, the incumbent licensee would have been immune from challenge altogether unless a challenger were also permitted to specify a short-spaced site.

8. Here, however, there is a large geographic area of approximately 1,200 square kilometers (465 square miles) within which a renewal challenger can locate a transmitter site that both (a) would be fully-spaced to the Montgomery Channel 63 allocation and (b) would provide the requisite city-grade coverage to Monroe.<sup>4/</sup> From any available and suitable site within that area, a Monroe Channel 63 challenger could meet all of the Commission's technical requirements without a waiver.

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<sup>3/</sup> See Engineering Statement of Kevin T. Fisher (**Attachment 1** hereto), pp. 1-2 and Exhibits A and B.

<sup>4/</sup> Id., pp. 2-3 and Exhibit C.

Hence, a challenger does not need a short-spacing waiver in order to compete with the incumbent.

9. Assuming that a suitable site within the fully-spaced area is available to the challenger, there is absolutely no

using legitimate engineering evidence, that no properly spaced location is obtainable." North Texas Media, Inc. v. FCC, 778 F. 2d 28, 32 (D.C. Cir. 1985).<sup>7/</sup>

11. The fact of the matter is that suitable fully-spaced sites are available for use by Glendale. One such site is the existing tower of WFOX(FM), Gainesville, Georgia, which is located within the geographic area that would permit a Monroe Channel 63 applicant to meet the full-spacing requirement and provide the requisite service to Monroe.<sup>8/</sup> That tower was designed to accommodate a high power television antenna and has been continuously available for such use since 1987.<sup>9/</sup> In addition, at least three other usable sites within the "fully-spaced" area are available for lease or purchase by Glendale.<sup>10/</sup>

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<sup>7/</sup> See also, Townsend Broadcasting Corporation, 62 FCC 2d 511, 512, 38 RR 2d 880, 881 (1976); On the Beach Broadcasting, 7 FCC Rcd 1346, 1351, 70 RR 2d 880, 886 (Rev. Bd. 1992); Edens Broadcasting, Inc., 2 FCC Rcd 689, 693, 62 RR 2d 599, 606 (Rev. Bd. 1987); K-W TV, Inc., *supra*, 7 FCC Rcd at 3618, 70 RR 2d at 1657; Ogden Television, Inc., 7 FCC Rcd 3116, 3117 (VSD 1992).

<sup>8/</sup> Engineering Statement of Kevin T. Fisher, p. 3 and Exhibit C (**Attachment 1**).

<sup>9/</sup> See sworn Statement of Randy Mullinax (**Attachment 3** hereto) and Verified Statement of Harvey Budd (**Attachment 4** hereto).

<sup>10/</sup> See Verified Declaration of Charles Russell (**Attachment 5** hereto).

12. Because Glendale thus could specify a fully-spaced site, enforcement of the minimum separation requirements of Section 73.610 creates no "bias" or prejudice against Glendale. Hence, the ASD's rulings in Royce and EZ do not support Glendale's waiver request in this case.<sup>11/</sup>

## 2. The TV Rule Differs From the FM Rule

13. Not only does this case differ from Royce and EZ on the essential facts, but there is a critical difference between the TV short-spacing rule and the FM short-spacing rule. As the ASD noted in EZ, the FM rule (§73.213) permits existing short-spaced FM licensees to relocate to another similarly short-spaced site, so long as the current overlap is not increased.<sup>12/</sup> The ASD held that "under these circumstances"

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<sup>11/</sup> In cautioning against pro-incumbent bias, the Court of Appeals in Las Vegas Valley Broadcasting Co. v. FCC, 589 F. 2d 594, 600 (D.C. Cir. 1978), said merely that the Commission could not impose an "unrealistically stringent" financial qualifications standard on renewal challengers (emphasis added). Significantly, the Court did not exempt the challenger in that case from establishing that it was financially qualified, even though the incumbent was exempt from making such a showing and thus was treated under a different processing standard. The Court simply held that the challenger could not be held to an "unrealistically stringent" standard. In the short-spacing context, it is not "unrealistically stringent" to require a challenger to specify a fully-spaced site if one is available. That is no more stringent than requiring a challenger to obtain a bank letter if one is available. Thus, the principle of Las Vegas Valley is not violated by requiring Glendale to propose a fully-spaced site in this case.

<sup>12/</sup> Specifically, §73.213(a) states: "Stations at locations authorized prior to November 16, 1964 that did not meet the  
(continued...)"

it would be unfair not to process the challenger's application under the same standard. 8 FCC Rcd at 2451 (¶ 17). In other words, said the ASD, since a grandfathered incumbent FM licensee may relocate from one short-spaced site to another, the FM challenger should likewise be allowed to propose a similarly short-spaced site.

14. That rationale does not apply in TV, because the TV rule is materially different. Section 73.610(a) states explicitly that "applications for new TV broadcast stations or for changes in the transmitter sites of existing stations will not be accepted for filing if they fail to comply with the [mileage separation] requirements." 47 C.F.R. §73.610(a) (emphasis added). In other words, unlike FM incumbents, TV incumbents that are presently short-spaced may not relocate to another short-spaced site.<sup>13/</sup> If they relocate, the rule requires that they relocate to a fully-spaced site. Since TV incumbents must propose fully-spaced sites if they relocate,

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<sup>12/</sup> (...continued)

separation distances required by §73.207 and have remained short-spaced since that time may be modified or relocated provided that the predicted distance to the 1 mV/m field strength contour is not extended toward the 1 mV/m field strength contour of any short-spaced station."

<sup>13/</sup> The only apparent exception is for TV stations that were operating short-spaced in 1952. See Note to §73.610(a). This exception does not apply to Trinity's Monroe station, which did not become operational until 1991.

there is no inequity in requiring TV challengers to propose fully-spaced sites.<sup>14/</sup>

**C. The Rule Was Not Waived for WHSG(TV)**

15. Glendale suggests that it deserves a waiver because the Commission "by implication, waived" the short-spacing rule when it granted the WHSG(TV) construction permit. Motion, p. 3. That claim is simply erroneous. WHSG(TV) was processed and granted without a waiver because its application (unlike Glendale's) fully complied with the short-spacing rules. The relevant facts are as follows.

16. The WHSG(TV) application for Channel 63 in Monroe (BMPCT-890809KE) was filed on August 9, 1989, and specified a site at 33-44-22, 84-00-14.<sup>15/</sup> The Engineering Statement in the application noted that this site was fully-spaced to the proposed new site of WTSU-TV, Channel 63, Montgomery, pursuant to an agreement between the two permittees to eliminate short-spacing. Id., Engineering Statement, p. 3 (**Attachment 6**).

17. Shortly afterward, on September 1, 1989, WTSU-TV filed an application (BMPET-890901KE) to relocate its site to 32-17-

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<sup>14/</sup> In designating the short-spacing issue against Glendale, the Video Services Division (VSD) was presumably fully aware of the difference between the FM and TV short-spacing rules. The VSD was also necessarily aware that Glendale's waiver request made no threshold showing that fully-spaced or less short-spaced sites are unavailable.

<sup>15/</sup> See Attachment 6 hereto.

24, 86-36-40.<sup>16/</sup> The accompanying transmittal letter asked that the WTSU-TV application (Montgomery Channel 63) be considered with the pending WHSG(TV) application (Monroe Channel 63).

18. The distance between the transmitter sites specified in the respective applications was 181.4 miles (292 kilometers), which exceeded by almost 7 miles the required minimum separation under Section 73.610(b).<sup>17/</sup> For this reason, no waiver of the short-spacing rules was needed to process and grant the WHSG(TV) application. Section 73.611(b)(1) states that in licensing proceedings the relevant station separations are measured by the distance between the proposed transmitter site in one community and the authorized transmitter site in the other community. The WTSU-TV (Montgomery) site became authorized on November 15, 1989, when the Commission granted BMPET-890901KE.<sup>18/</sup> Thus, when the Commission granted the WHSG(TV) site two weeks later on November 29, 1989, that site was fully-spaced and grantable without a waiver.<sup>19/</sup>

19. That WHSG(TV) is currently short-spaced to the Montgomery Channel 63 allocation results solely from the fact

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<sup>16/</sup> See Attachment 7 hereto.

<sup>17/</sup> See Engineering Statement of Kevin T. Fisher, p. 4  
(Attachment 1)

that the Commission subsequently canceled the WTSU-TV construction permit in June 1990.<sup>20/</sup> Under Section 73.611(b)(3), this converted the relevant Montgomery Channel 63 reference point from the formerly authorized WSTU-TV site to the Montgomery main post office. However, it does not alter the fact that when WHSG(TV) applied for and was granted its present site, its proposal fully complied with the applicable mileage separation requirements and was not granted via waiver.

20. Accordingly, there is no merit to Glendale's argument that Glendale should get a waiver because WHSG(TV) got one. To the contrary, Glendale should be held to the same requirement



aggravating the existing short-spacing. Glendale contends that because WHSG(TV) is short-spaced by 18.14 kilometers, while Glendale's site would be short-spaced by 18.40 kilometers, the increase in short-spacing is merely 0.26 kilometers and is excusable as de minimis. Motion, pp. 3-4.

22. This argument seriously misreads the policy stated by the Commission in the very case that Glendale cites, Kentner Broadcasting Co., 62 RR 2d 1573, 1577, n. 9 (1986). The Commission there made clear that the de minimis exception justifies a short-spacing waiver only "when the short-spacing is de minimis." Id. (emphasis added). A de minimis short-spacing was defined as a short-spacing of not more than one mile or 1.6 kilometers. Id. Here, the 18.40 kilometer short-spacing proposed by Glendale is far more than de minimis. Glendale tries to suggest that the de minimis exception applies because the increase over existing short-spacing is an increase of only 0.26 kilometers. However, the amount of increase is not relevant. What is relevant is the total distance by which the proposed site is short-spaced. As the Commission plainly stated in Kentner, the de minimis exception will not be invoked "in any case . . . where the applicant propose[s] to be short-spaced by more than one mile or 1.6 kilometers." Id.

23. Glendale's argument is without merit for another reason as well. The TV short-spacing rules expressly proscribe any increase in existing short-spacing, even by grandfathered

stations. Thus, the Note to Section 73.610(a) provides that while grandfathered stations may continue to operate, "in no event may they further reduce the separations below the minimum" (emphasis added). This reflects a very strong Commission policy against allowing any aggravation of existing short-spacings. Glendale's site proposal violates this flat prohibition -- a prohibition that precludes even WHSG(TV) from moving to the site Glendale has specified. Thus, even if Glendale were deemed entitled to a short-spaced site because the incumbent WHSG(TV) is short-spaced, Glendale is plainly barred from proposing a site that is more short-spaced than WHSG(TV).<sup>21/</sup>

24. The two public interest factors invoked by Glendale are wholly inadequate to overcome this proscription. First, citing Sarkes Tarzian, Inc., 6 FCC Rcd 2465, 2467, 69 RR 2d 157, 160 (1991), Glendale notes that its directional operation would cause no more interference to the Montgomery allotment than would a station using maximum facilities from a fully-spaced site. Motion. pp. 5-6. However, that was a minor factor in

here. Moreover, the Commission has recently denied waiver requests by applicants making a similar argument to Glendale's. Murray Hill Broadcasting Company, 8 FCC Rcd 325, 326, 71 RR 2d 1335, 1336 (1993); Crain Broadcasting, Inc., FCC 93-311, released July 2, 1993.

25. Second, Glendale notes that its short-spaced proposal still leaves an area of 517 square kilometers within which a potential Montgomery Channel 63 applicant can place a transmitter that is fully-spaced to Glendale. Motion, p. 6. However, the Commission does not favor short-spaced proposals that "would severely restrict the ability of a future applicant [on the affected channel] from finding a site that would meet all Commission requirements." Ogden Television, Inc., supra, 7 FCC Rcd at 3117. Here, Glendale's proposed short-spacing eliminates almost two-thirds of the area that would be available for a Montgomery applicant if Glendale were fully-spaced.<sup>22/</sup>

#### E. Conclusion

26. It is clear from the undisputed facts that Glendale does not warrant a waiver of Section 73.610 of the Rules. Unlike the renewal challengers in EZ and Royce, Glendale could easily have specified a fully-spaced site. By opting instead for a site that is short-spaced by 18.40 kilometers, Glendale

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<sup>22/</sup> Engineering Statement of Kevin T. Fisher, pp. 4-5 and Exhibit D (**Attachment 1**).

not only proposes a substantial and wholly unnecessary violation of the rules, but seeks actually to increase the current short-spacing on the channel.

27. There is no public interest justification for the violation that Glendale urges be waived. Because it could file a grantable application with a fully-spaced site, Glendale suffers no disadvantage or prejudice from the fact that the incumbent WHSG(TV) has a short-spaced site. Nor would enforcement of Section 73.610 subject Glendale to a stricter processing standard, since WHSG(TV) had to (and did) demonstrate full compliance with Section 73.610 when it obtained its present site without any waiver.

28. The Commission's short-spacing rules for television reflect a particularly strong policy of maintaining the integrity of the minimum mileage separation requirements. Where an applicant, like Glendale, can propose a perfectly suitable fully-spaced site without jeopardizing the grantability of its application or suffering any comparative disadvantage, there is absolutely no public interest justification for sacrificing the integrity of the separation rules.

29. Accordingly, the Presiding Judge should adopt an order (a) finding that waiver of Section 73.610 for Glendale is not warranted, (b) resolving Issue 1(a) against Glendale, (c)

denying Glendale's Motion for Summary Decision, and (d) granting Trinity's Countermotion for Summary Decision.

Respectfully submitted,

TRINITY CHRISTIAN CENTER OF SANTA  
ANA INC., d/b/a TRINITY  
BROADCASTING NETWORK

By: Colby M. May  
Colby M. May  
Joseph E. Dunne, III *h32*

May & Dunne, Chartered  
1000 Thomas Jefferson Street,  
N.W. - Suite 520  
Washington, D.C. 20007  
(202) 298-6345

By: Nathaniel F. Emmons  
Nathaniel F. Emmons  
Howard A. Topel

Mullin, Rhyne, Emmons and Topel,  
P.C.  
1000 Connecticut Ave. - Suite 500  
Washington, D.C. 20036-5383  
(202) 659-4700

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## ENGINEERING STATEMENT

The engineering data contained herein have been prepared on behalf of TRINITY BROADCASTING NETWORK ("Trinity"), licensee of WHSG(TV), Channel 63, Monroe, Georgia, in support of its Countermotion for Summary Decision filed in response to the Motion for Summary Decision filed by Glendale Broadcasting Company ("Glendale") in the WHSG license renewal proceeding (MM Docket No. 93-156). In its motion, Glendale argues that it should be allowed to specify the site described in its mutually exclusive application (BPCT-920228KE, as amended March 5, 1993), even though the site is significantly short-spaced to an allocation on Channel 63 in Montgomery, Alabama.

In support of its argument, Glendale cites the following cases: *EZ Communications, Inc.*, 8 FCC Rcd 2448, 2451 (MMB 1993), and *Royce International Broadcasting*, 2 FCC Rcd 1368 (MMB 1987). In these cases, mutually exclusive competing applications were filed against the FM renewal applications of WBZZ, Channel 229B, Pittsburgh, Pennsylvania, and KWOD Channel 293B, Sacramento, California, respectively. The FCC ruled in each case that, since the site of the existing licensee had a grandfathered shortspacing to another FM authorization or allocation, the challenger had the right to file for a similarly short-spaced site. The difference between these cases and that of WHSG is that there is ample non-short-spaced area within which a new Channel 63 station in Monroe can locate, whereas no non-short-spaced sites existed for the FM challengers' use in the Sacramento

Channel 293B case or the Pittsburgh Channel 229B case.

Exhibit A is a map upon which the allocation situation with respect to the use of Channel 229B in Pittsburgh is shown. It is evident that any site located within 60 miles of Pittsburgh would be short-spaced to at least one FM station or allotment. WBZZ(FM), the incumbent licensee, enjoys grandfathered shortspacings to an allotment in Barnesboro, Pennsylvania, and to WQIO(FM), Mount Vernon, Ohio. Since a maximum Class B facility typically has a "city grade" (70 db $\mu$ ) contour distance of 20 miles, and since the closest non-short-spaced area is more than 60 miles from Pittsburgh, there is no site from which a WBZZ renewal challenger could propose acceptable service to Pittsburgh without a waiver of the FCC's spacing requirements.

Exhibit B is a similar map showing the allocation situation for Channel 293B in Sacramento. The same conclusion drawn from the preclusive Pittsburgh case applies here: absent a waiver of the Commission's station separation Rules, there is no site from which a renewal challenger of KWOD, whose shortspacing to KEZR, San Jose, California, is grandfathered, can meet the required spacing to KEZR and still provide 70 db $\mu$  service to Sacramento.

Such is not the case in the Monroe proceeding. Exhibit C is a map upon which the allocation area for Channel 63, Monroe, is plotted. It may be seen that there are approximately 1200 square kilometers (465 square miles) in which to locate a transmitter site that is properly spaced to the



Montgomery allocation, yet close enough to Monroe to provide the requisite City Grade (80 db $\mu$ ) service over the entirety of the city. Within this area, there are any number of available sites which would meet the spacing and coverage requirements of a Channel 63 allocation in Monroe.

For example, the present site of WFOX(FM) is plotted in Exhibit C and clearly lies within the available allocation area. Based upon information from the tower owner, there is sufficient space available for a full-power television antenna to be mounted with enough height so as to place the requisite city-grade service contour over the entirety of Monroe. Presumably, there are other sites within the allocation area which also would afford such coverage.

With respect to WHSG's existing shortspacing to the Channel 63 allotment in Montgomery, it resulted from the FCC's cancellation of the Construction Permit of fully spaced WTSU-TV and the channel's reverting to an allotment, whose reference coordinates are short-spaced to WHSG's transmitter site. This, in detail, is what took place.

On November 15, 1989, the FCC granted a modification application to The Troy State University System, permittee of WTSU-TV, Channel 63, Montgomery, Alabama. The modified Construction Permit, BMPET-890901KE, specified a site with coordinates of 32° 17' 24", 86° 36' 40". Two weeks later, on November 29, 1989, the Commission granted the modification application of Monroe Television, Inc., the original permittee of WHSG, Channel 63, Monroe, Georgia. Its new Construction Permit, BMPCT-890309KE, specified a